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No. 06-5306

In the Supreme Court of the United States

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether a litigant who has been granted a motion under Federal Rule of Appellate Procedure 4(a)(6) to reopen the time to appeal must comply with the 14-day time limit set forth in that rule and in the corresponding statute for filing his notice of appeal, or can be excused from his untimely filing by a district court order that erroneously granted a deadline that was beyond that allowed by the rule and statute?

2. Whether an appellate court may dismiss, either sua sponte or in response to an appellee's urging, such an appeal as untimely?

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INTRODUCTION

This case presents a confrontation between the judicial system's interest in preserving the integrity of its procedural deadlines and a litigant's effort to avoid the consequences of his untimely actions.

On one side, the Respondent State here urges the Court to strictly enforce the deadlines for filing notices of appeal, including the deadline that Petitioner Bowles missed. The time limits for appeals play a critical role in policing the boundaries between the district and appellate courts, so they must be rigidly enforced, can be raised sua sponte, and are treated as mandatory and jurisdictional. Accordingly, the Sixth Circuit properly dismissed Bowles's appeal as untimely. On the other side, Bowles claims that, after already having been excused for missing his original deadline for filing his notice of appeal (by the district court's granting his motion to reopen the time to file), he should be excused again—this time for missing the deadline set forth in the very rule he relied upon in his motion. He therefore now appeals the Sixth Circuit's dismissal.

Both 28 U.S.C. § 2107 and the Federal Rules of Appellate Procedure ("Appellate Rules") set forth clear and mandatory deadlines for filing a notice of appeal in a court of appeals, thereby triggering appellate court review. The principle that such notice-of-appeal deadlines are jurisdictional and thus nonforfeitable has been consistently recognized in over 150 years of appellate practice, judicial decisions, and congressional acquiescence. Moreover, courts have inherent power to enforce their own rules sua sponte, even when the rules in question are not jurisdictional. The Sixth Circuit's action in dismissing the case below is simply an uncontroversial instance of a court of appeals dismissing an untimely appeal, as it was authorized and required by law to do.

Bowles's argument, on the other hand, is based on his attempt to appeal to equity. But equitable considerations cannot excuse a litigant from complying with notice of

appeal time requirements because such requirements are necessarily inviolate. Moreover, even if equitable concerns could excuse untimely appeals, Bowles presents no equitable reasons that would justify his untimely filing. Bowles attempts to invoke equity on the ground that he relied on the district court's mistaken calculation of the notice-of-appeal deadline. But Bowles himself requested relief under the very rule with which he did not comply, and in any event, he, like all litigants, is charged with the independent responsibility of complying with the federal rules. Bowles also suggests that equity should support his claim because the State did not take affirmative steps to clarify his due date for him. But it is the responsibility of each party, and not of a party's opponent, to avoid his own errors.

The weakness of his equitable claim notwithstanding, Bowles now asks the Court to overrule 150 years of precedent and repeated congressional recodifications that stand for the essential proposition that untimely appeals must be dismissed. His request should be denied, and the Court should affirm the Sixth Circuit's dismissal of his untimely appeal.

STATEMENT OF THE CASE

An Ohio jury convicted Petitioner Keith Bowles of murder for his participation in a fatal group beating of an unarmed man. Bowles is now serving an indeterminate sentence of fifteen years to life. See JA 177-78 (6th Cir. Op.). After exhausting his opportunities for direct appeal in state court, Bowles filed a federal petition for a writ of habeas corpus. JA 14-22. A magistrate judge issued a report and recommendation that the petition be denied. JA 89-104. In an order and judgment dated July 10, 2003, see JA 141-42, and entered on July 28, 2003, see JA 10 (district court docket), the district court adopted the magistrate judge's report and recommendation over Bowles's objections. The court denied

Bowles's habeas petition, and denied Bowles a certificate of appealability. Bowles moved for a new trial under Federal Rule of Civil Procedure ("Civil Rule") 59 or to amend the judgment under Civil Rule 52. JA 143-44. The district court entered a marginal order denying Bowles's motions on September 9, 2003; this was a final appealable order. JA 145.

Bowles claimed that he was never served with the district court's September 9, 2003 order. JA 147-49. He claimed that he learned of the final order when, about three months after the order was entered, on December 5, 2003, Bowles's lawyer checked the docket and noticed the final order. *Id.* Based upon his lack of timely receipt of the September 9 order, Bowles moved to vacate that order or to reopen the appeal period pursuant to Appellate Rule 4(a)(6). *Id.* In his motion to reopen, he quoted the full text of Appellate Rule 4(a)(6), which states that, if certain conditions are met, "the district court may reopen the time to file an appeal for a period of 14 days after the date when the order to reopen is entered." JA 148. Bowles cited no authority for his motion to vacate, but stated that the motion was "because the undersigned was never sent nor did the undersigned ever received [sic] notification of [the September 9] order." JA 147. Bowles's motion to vacate, therefore, was not premised upon the merits of his habeas claims or upon any other alleged error in the district court's judgment.

In a marginal order entered February 10, 2004, the district court denied Bowles's motion to vacate, but granted his Rule 4(a)(6) motion to reopen time for appeal. The district court's marginal notation stated, in part, "appeal to be filed by 2/27/04," i.e., 17 days after the order to reopen was entered, or three days more than the 14 that Appellate Rule 4(a)(6) allows. JA 151.

Bowles eventually filed his notice of appeal on February 26, 2004, which was 16 days after the district court

granted his motion to reopen. JA 153. The notice therefore was not timely under the Rule, although it was filed before the deadline stated in the district court's order.

Bowles's notice of appeal said that he appealed: 1) the district court judgment and order dated July 10, 2003 (the order on the merits, denying Bowles's habeas petition and denying a certificate of appealability), and 2) the district court judgment and order entered September 9, 2003 (denying Bowles's Rule 52 and Rule 59 motions). Bowles's notice of appeal did *not* state that he appealed the district court's February 10, 2004 order denying his motion to vacate and granting his motion to reopen time for appeal. JA 153.

The Sixth Circuit docketed Bowles's appeal on March 3, 2004. See JA 1 (6th Cir. docket). The Sixth Circuit's clerk's office noted that Bowles's notice of appeal fell outside of the 14-day window permitted under 4(a)(6), and on March 10, 2004, it ordered Bowles to show cause why the appeal should not be dismissed as untimely. JA 154. Bowles responded that he had relied upon the district court's order, which expressly re-opened his appeal window until February 27, 2004. JA 156. Bowles also asked, for the first time, that the court also review the district court's February 10, 2004 order, since, "in any event, . . . [t]he notice of appeal was filed within thirty (30) days of the date of that order." JA 156-57. The court did not ask the State to respond.

A Sixth Circuit panel then dismissed Bowles's appeal from both the July 10[1] order denying his habeas petition as well as the September 9 order denying his Civil Rule 52 and 59 motions, finding both appeals to be untimely under Appellate Rule 4(a). The court then concluded that "[t]he

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[1] The Sixth Circuit's order refers to the district court's order by the date it was entered, as opposed to the date that it was signed. It therefore states it is dismissing Bowles's appeal from the "July 28, 2003 order."

appeal was timely filed as it applies to the February 10, 2004 ruling," that is, the ruling denying Bowles's motion to vacate and granting his motion to reopen his appeal window, which Bowles's original notice of appeal did not mention. JA 161.

Bowles also failed to ask the Sixth Circuit for a certificate of appealability ("COA"), but the Sixth Circuit construed Bowles's notice of appeal as an application for a COA, as Appellate Rule 22(b)(2) allows. Bowles was required to obtain a COA from the appeals court because the district court had denied him one, and 28 U.S.C. § 2253(c)(2) requires habeas petitioners to obtain a COA from one of the two courts. On September 8, 2004, the court denied Bowles a COA, noting that the standard requires "a substantial showing of the denial of a constitutional right," JA 162, and that "Bowles has not met that burden here because his claims are all lacking in substantive merit, barred by an unexcused procedural default, and/or based on issues of state law that do not rise to the level of a constitutional violation," JA 163.

Bowles sought reconsideration, arguing the merits of his habeas claims but failing to address the untimeliness of his appeal. JA 164-73. A new panel reviewed Bowles's motion, construing it as a petition for panel rehearing under Appellate Rule 40(a), and ruled on the petition without asking the State to respond. Under Appellate Rule 40(a)(3), the State could not respond without the court's request. The panel granted Bowles a COA on one of his habeas issues. JA 174.

The parties completed briefing by April 25, 2005. In the State's four-page jurisdictional statement, it argued that the court lacked jurisdiction over the appeal, and called the court's attention to the untimeliness of Bowles's notice of appeal under Rule 4(a)(6). See Respondent-Appellee's Final Br., p. 1-4 (filed with United States Court of Appeals for the Sixth Circuit on April 22, 2005) ("Respondent's 6th Cir.

Br."). Bowles declined to file a reply brief, see JA 3-4 (6th Cir. docket), so he never responded to the State's jurisdictional argument.

The case was submitted on the briefs. The Sixth Circuit filed an opinion and judgment dismissing Bowles's appeal as untimely on December 28, 2005. JA 176-92. Bowles filed a petition for rehearing and suggestion for rehearing en banc, in which he addressed the issue of his untimely appeal and for the first time requested that the court, rather than dismiss his appeal, remand for a new district court order reopening the appeal window. The court of appeals denied Bowles's petition for rehearing and suggestion for rehearing en banc. JA 193.

Bowles petitioned for a writ of certiorari on July 14, 2006. The Court granted Bowles's petition for certiorari review on December 7, 2006.

SUMMARY OF THE ARGUMENT

Bowles's notice of appeal was untimely under the plain language of Rule 4(a)(6) and 28 U.S.C. § 2107. Even if the State had never argued untimeliness, the Sixth Circuit was required to dismiss Bowles's appeal. The courts have treated notice-of-appeal deadlines as jurisdictional for more than 150 years, and Congress has ratified and incorporated this understanding in its repeated recodification of the governing statute. Regardless of whether such deadlines are labeled an aspect of subject-matter jurisdiction or a "prerequisite" to appellate jurisdiction, courts have, with good reason, consistently treated them as nonforfeitable.

Even if the Sixth Circuit had not been obligated to dismiss Bowles's untimely appeal, it did not err in so doing. The State properly raised the issue in its appellee brief, to which Bowles did not respond, and the merits panel properly considered and accepted the argument. Further, the Court has

long recognized that a circuit court has the inherent authority to enforce appeal deadlines. If courts were to lose that power, as Bowles urges, efficient maintenance of federal court dockets would depend solely on the diligence and discretion of the parties.

Having failed on the law, Bowles cannot salvage his case by appeals to equity. Bowles seeks to invoke the equitable doctrine of "unique circumstances," but that doctrine requires a showing of reasonable reliance, and Bowles cannot clear that bar. First, he raises no reliance interest. He did not, as he contends, do "all he could under the circumstances," see Pet. Br. at 13; he could have easily filed his notice of appeal in 14 days. Second, litigants in any event are not relieved of their obligation to comply with the federal rules merely because a district court makes an obvious error.

Finally, Bowles's alternate "remand" suggestion—that the Sixth Circuit should have remanded the case to the district court to again reopen the time to appeal—is untenable. Bowles's appeal was untimely filed, so the appellate court had no jurisdiction and thus no authority to remand. Even if it had such authority, it did not abuse its discretion in declining to remand.

The Court should affirm the Sixth Circuit's judgment dismissing Bowles's appeal.

ARGUMENT

A. Bowles's appeal was untimely.

Bowles's appeal was untimely because the Appellate Rules and United States Code bar a party from appealing more than 14 days after the time for appeal has been reopened, regardless of what a district court purported to authorize.

Congress has vested the courts of appeals with jurisdiction over certain appeals, including final orders from district courts, see 28 U.S.C. § 1291, but prohibits the appellate courts from hearing an appeal unless the appealing party files a timely notice of appeal, see 28 U.S.C. § 2107. The Supreme Court has rulemaking authority to establish the procedures through which these conditions will be satisfied. 28 U.S.C. § 2072. The current rules governing timely filing of a notice of appeal are the Appellate Rules.

A notice of appeal is unique among procedural filings, as its filing is the event that triggers transfer of a case from district court to appellate court, thus creating *jurisdiction* in the appeals court. The requirement that an appellant initiate an appeal by filing a notice of appeal is set forth in both 28 U.S.C. § 2107 and Appellate Rule 3. "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). "And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act." *Id.* at 61.

Reflecting the importance of the notice of appeal filing, the Appellate Rules and United States Code strictly limit the time in which a party may file the necessary notice of appeal. "An appeal permitted by law as of right from a district court to a court of appeals may be taken *only* by filing a notice of appeal with the district clerk *within the time allowed by Rule 4*." Fed. R. App. P. 3(a)(1) (emphases added). Under Rule 4(a)(1), a private civil party typically has 30 days from the judgment entry to file a notice of appeal. See also 28 U.S.C. § 2107(a) (stating "*no appeal shall bring* any judgment, order or decree in an action, suit or proceeding of a civil nature *before a court of appeals* for review unless notice of appeal is filed, within 30 days after the entry, [with certain limited exceptions]") (emphases added).

Appellate Rule 4 and § 2107 provide for two very limited exceptions to the 30-day appeal window. First, a party may seek an extension if he applies for the extension within 30 days of the expiration of his first appeal period, but he must show excusable neglect or good cause, and the extension may not exceed the longer of 30 days from the end of the original appeal period or 10 days from the district court's entry of its order. See 28 U.S.C. § 2107(c); Fed. R. App. P. 4(a)(5). Second, within 180 days of the district court's judgment, an appellant may petition for reopening the appeal period for 14 days, if the appellant did not receive notice of final judgment and if he applies for reopening within seven days of learning of the final judgment. See 28 U.S.C. § 2107(c)(1)-(2); Fed. R. App. P. 4(a)(6).

The Appellate Rules do not allow any expansions of the appeal notice deadline other than those explicitly permitted under Rule 4. Indeed, unique among all of the Appellate Rule deadlines, only notice-of-appeal deadlines are fixed and unable to be extended by a district court for good cause. See Fed. R. App. P. 26(b). The timely-appeal requirement is also unique among all of the Rule 3 conditions: If an appellant fails to satisfy any of the other requirements set forth in Rule 3 for taking an appeal, including rules governing the contents of the notice of appeal and the manner of service, the error "does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." See Fed. R. App. P. 3(a)(2). By contrast, the failure to file a timely notice of appeal is the one act that *does* affect the validity of the appeal. It implicitly carries with it a harsher sanction than the court's *discretionary* ability to dismiss: *mandatory* dismissal.

Here, Bowles failed to satisfy the Appellate Rules' and § 2107's requirement regarding a timely notice of appeal, so he failed to perfect an appeal to the Sixth Circuit. Bowles

claimed he did not learn of the district court's final order until three months after it was entered. See JA 179. By that point, Bowles had missed both the standard deadline for filing a notice of appeal and the deadline for seeking an extension under Rule 4(a)(5) and § 2107(c), so he could appeal only if the district court granted a motion under Appellate Rule 4(a)(6) and § 2107(c)(1)-(2) to reopen the appeal period for 14 days. The district court granted Bowles's 4(a)(6) motion on February 10, 2004, but mistakenly gave Bowles 17 days to file his notice of appeal. See JA 145 (district court marginal order). Although Bowles was aware of the Rule's 14-day time limit—indeed, he had recited it *verbatim* in his motion to reopen—he nevertheless took 16 days to file his one-page notice of appeal. See JA 153.

The district court had no authority to extend the 14-day window provided under Rule 4(a)(6). Appellate Rule 26(b)(1) specifically prohibits the court from extending the time to file a notice of appeal "except as authorized in Rule 4." See also National Association of Criminal Defense Lawyers ("NACDL") Amicus Br. at 6 (conceding that "district court clearly erred in permitting petitioner to file a notice of appeal more than 14 days after the court issued its order"). Furthermore, the Rule's Committee Notes confirm that the drafters intended to provide a "limited" window for appeal, and expressly state that if a Rule 4(a)(6) motion is granted, "the district court may reopen the time for filing a notice of appeal *only* for a period of 14 days from the date of entry of the order reopening the time for appeal." See 1991 Committee Notes to Rule 4(a)(6) (emphasis added).[2]

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[2] Bowles's reliance on Civil Rule 6 is misplaced, because that rule governs extensions only for time frames specified "by *these rules*" (emphasis added), that is, by the Federal Rules of *Civil* Procedure. Civil Rule 6 does not apply to extend the appeals deadline, which is

Because Bowles's appeal was untimely under Rule 4 and 28 U.S.C. § 2107, the Sixth Circuit merits panel properly dismissed Bowles's untimely appeal.

B. The circuit court was required to dismiss Bowles's untimely appeal.

As discussed below in Part C.1, the State properly objected to Bowles's untimely appeal; it did so in the State's first responsive brief in the appeals court. But, in any event, the untimeliness argument is not subject to appellee forfeiture, since Bowles's untimely appeal is jurisdictionally defective. Bowles needs to convince the Court *both* that the appeals deadline is a forfeitable appellee defense *and* that the State forfeited it here. The State may win on either point; as it happens, it wins on both.

1. The courts of appeals do not have jurisdiction to hear untimely appeals.

The enforcement of deadlines is essential to the effective functioning of a legal system. With respect to notices of appeal, moreover, rigid adherence to time limits is especially critical, because those time mandates enforce finality and set forth the divisions of authority between the lower and the appellate courts. Not surprisingly, then, the Court for over 150 years has accurately described the time requirements governing the filing of a notice of appeal as

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specified by *Appellate* Rule 4(a) and which is rendered inflexible by *Appellate* Rule 26(b). Appellate Rule 1(a)(2)'s instruction to comply with district court practices when filing a notice of appeal does not, as Bowles contends, operate to nullify the Appellate Rules governing time for appeal. Indeed, the prohibition on extending appeal time was once part of Civil Rule 6 itself, until incorporated into Federal Rules of Criminal Procedure and then, later, the Appellate Rules. See *United States v. Robinson*, 361 U.S. 220, 228-29 (1960).

nonforfeitable and jurisdictional. See E. King Poor, *Jurisdictional Deadlines in the Wake of* Kontrick *and* Eberhart: *Harmonizing 160 Years of Precedent*, 40 Creighton L. Rev. 181, 187-90 (2007). Equally important, Congress has refused to disrupt this fundamental understanding when it repeatedly codified notice-of-appeal deadlines for the courts of appeals. See Evarts Act of 1891, ch. 517, § 11, 26 Stat. 826, 829; Act of March 3, 1911, ch. 231, § 129, 36 Stat. 1087, 1134; Judiciary Act of 1925, ch. 229, § 8, 43 Stat. 936, 940; Act of June 25, 1948, ch. 646, § 2107, 62 Stat. 963, 963, codified at 28 U.S.C. § 2107. Bowles now seeks to overturn a lengthy history of judicial decisions and congressional acquiescence.

A defect in an appeals court's subject-matter jurisdiction is not subject to forfeiture by an appellee's failure to raise the issue; whenever a court perceives that it lacks jurisdiction over an appeal, the court must sua sponte dismiss the appeal. See *Mansfield, Coldwater & Lake Mich. RR. Co. v. Swan*, 111 U.S. 379 (1884). "Characteristically, a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct." *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004).

An appeal's untimeliness was considered a jurisdictional bar even before the courts of appeals were created. In *United States v. Curry*, 47 U.S. (6 How.) 106, 110 (1848), the Court dismissed an appeal "for want of jurisdiction" because the appellant failed to timely comply with the statutory requirements for appealing. The Court observed that Congress, and not the courts, has the "power to prescribe the time or manner in which the record was to be transmitted, and the case brought before this court" on appeal. *Id.* at 112. In rejecting the argument that the error was a "mere technicality, and may be regarded rather as a matter of form than of substance," the Court noted that it had no authority to disregard rules set forth by Congress for the

operation of the courts, and observed that, "if the mode prescribed for removing cases . . . be too strict and technical, and likely to produce inconvenience or injustice, it is for Congress to provide a remedy by altering the existing laws; not for the court." *Id.* at 113. Accordingly, the Court dismissed the appeal for lack of jurisdiction. *Id.*

The *Curry* Court's treatment of an appeal deadline as jurisdictional is echoed in several other Court decisions from the same time period. See *Scarborough v. Pargoud*, 108 U.S. 567, 568 (1883) (dismissing case for lack of jurisdiction due to untimely lodging of writ of error); *Credit Co. Ltd. v. Ark. Cent. Ry. Co.*, 128 U.S. 258, 261 (1888) (dismissing appeal sua sponte on ground that appellant had not complied with requisite deadline); *Villabolis v. United States*, 47 U.S. (6 How.) 81 (1848), (declaring that party's effort to appeal without complying with Congress's appeal requirements "was a mere nullity" and therefore "must be dismissed."); *Steamer Virginia v. West*, 60 U.S. (19 How.) 182, 183 (1856) (dismissing appeal for lack of jurisdiction due to appellant's failure to file transcript by deadline); *Mesa v. United States*, 67 U.S. (2 Black) 721 (1862) (same); *Edmonson v. Bloomshire*, 74 U.S. 306, 310 (1869) (same).

The Court continued to interpret the deadline as jurisdictional under later law. In *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943), the Court again declared it was "without jurisdiction to entertain" an appeal filed past the statutory deadline for appeals to the Supreme Court. The rule's purpose, the Court observed, is "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands." "Any other construction of the statute," the Court noted, "would defeat its purpose." *Id.*

When Congress created the courts of appeals it continued to require that appeals be taken within a certain time, see Evarts Act of March 3, 1891, 26 Stat. at 829, just as it had done when it created the very first lower federal courts, see Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 85. The Act creating the appeals courts stated that "no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed," and any existing shorter deadlines remained in effect. *Id.* In 1925, Congress reduced the deadline to three months. Judiciary Act of 1925, 43 Stat. at 940.

Congress reenacted the statutes conferring appellate court jurisdiction in 1948, again including a mandatory deadline for notices of appeal. See Act of June 25, 1948, 62 Stat. at 963, codified at 28 U.S.C. § 2107. Since then, Congress has continued to endorse the mandatory language regarding satisfying the appeal deadline. See Act of May 24, 1949, ch. 139, §§ 107-08, 63 Stat. 89, 104-05; Act of Nov. 6, 1978, Pub. L. No. 95-598, Title II, § 248, 92 Stat. 2549, 2672. The most recent revision harmonized § 2107 with the recent edits to Appellate Rule 4(a)(6). See Act of Dec. 9, 1991, Pub. Law No. 102-198, § 12, 105 Stat. 1623, 1627.

Since § 2107's enactment, the Court has continued to characterize the appeal deadline as jurisdictional. In *United States v. Robinson*, 361 U.S. 220, 229 (1960), the Court held that a district court could not enlarge the appeal time upon a finding of excusable neglect, noting that "[t]he courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional." In *Fallen v. United States*, 378 U.S. 139, 142 (1964), the Court declared that "the timely filing of a notice of appeal is a jurisdictional prerequisite to the hearing of the appeal." Citing *Robinson*, the Court said again, in *Browder v. Director, Illinois Dep't of*

Corr., 434 U.S. 257, 264 (1978), that Rule 4(a)'s 30-day time limit is "mandatory and jurisdictional." By 1982, the Court described as "well settled" the jurisdictional nature of the timely-notice-of-appeal requirement. *Griggs*, 459 U.S. at 61. In *Smith v. Barry*, 502 U.S. 244, 249 (1992), the Court reemphasized the jurisdictional nature of Appellate Rules 3 and 4 by contrasting their requirements with the *non*jurisdictional requirements of other rules. And in 2001, the Court took the opportunity to "clarify" that the appeal deadlines set forth under Appellate Rules 3 and 4 and § 2107 are jurisdictional. See *Becker v. Montgomery*, 532 U.S. 757, 760, 765 (2001). Therefore, "*if the notice is timely filed* and adequate in other respects, jurisdiction will vest in the court of appeals." *Id.* (emphasis added); see also *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 n.6 (2003) (recognizing that § 2107 is jurisdictional).[3]

The Court also has not restricted its discussion of jurisdictional appeal deadlines to cases involving appeals from district courts. The Appellate Rules and § 2107 apply with equal jurisdictional force when a party seeks appellate

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[3] When Congress, through the Rules Enabling Act of 1934, 48 Stat. 106, gave the Court the power to promulgate rules governing federal procedure, Congress did not alter the basic understanding that compliance with those deadlines was jurisdictional. Even after vesting the Court with this power, Congress's recodification of the Title setting forth appellate court jurisdiction continued to provide a mandatory deadline for taking an appeal. See Act of 1948, 62 Stat. at 963. The Court has continued to treat both the statute and corresponding rules as setting jurisdictional appeal deadlines. See, e.g., *Becker*, 532 U.S. at 765; *Browder*, 434 U.S. at 258; *Robinson*, 361 U.S. at 224, 229; *Coppedge v. United States*, 369 U.S. 438, 442 n.5 (1962); cf. *Smith v. Barry*, 502 U.S. at 686 (contrasting *non*jurisdictional Rules such as Fed. R. App. P. 31(a) with Rules' timely-appeal requirement). And in 1991, Congress again endorsed the Court's understanding by passing the statute again. See Act of Dec. 9, 1991, Pub. Law No. 102-198, 105 Stat. at 1627.

court review of an agency determination, including appeals from the Board of Immigration Appeals. When an untimely petition is filed, the Court has observed, the court of appeals "lack[s] jurisdiction to review [the Board of Immigration Appeals'] order." *Stone v. INS*, 514 U.S. 386 (1995).

The Court has also continued to treat as jurisdictional the statutory deadline for petitioning the Court for certiorari review. Under 28 U.S.C. § 2101(c), a party to a civil action must petition for a writ of certiorari with the Supreme Court within 90 days of the lower court's judgment. In *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990), the Court called the 90-day limit for civil cases "mandatory and jurisdictional," and held that the Court is obligated to dismiss a petition if a petitioner does not satisfy the statute's requirement. See also *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 90-91 (1994). Similarly, in 2004, the Court continued to refer to the § 2101(c) deadline as jurisdictional, observing that, "[b]ecause the petition for a writ of certiorari was timely under § 2101(c), we have jurisdiction to decide [the case]." See *Hibbs v. Winn*, 542 U.S. 88, 99 (2004).

The Court's description of appeal deadlines as "jurisdictional" has not been merely a matter of labeling, as the Court has repeatedly explained how the jurisdictional nature of deadlines obliges courts to police compliance. As with its treatment of other "jurisdictional" requirements, the Court has repeatedly identified a judicial duty to examine the issue of timely appeal sua sponte, regardless of whether a party has raised the issue. Thus, arguments regarding untimely appeal are not subject to forfeiture. As early as 1869, the Court expressly recognized its obligation to dismiss untimely appeals even absent a party's motion. See *Edmonson*, 74 U.S. at 310.[4] The Court reaffirmed that

[4] In a case decided before *Edmonson*, the Court suggested in dicta that courts could not take judicial notice of time limits on writs of error.

position in *Credit Co. Ltd.*, 128 U.S. at 258, when, after hearing argument on the merits, the Court sua sponte called counsels' attention to the untimeliness of the appeal and ultimately dismissed the appeal on those grounds. The Court has continued to consider notice-of-appeal issues even where appellees had failed to raise such issues. In *Becker*, for example, the Court appointed amicus curiae to defend the appeals court's sua sponte dismissal, because the respondent agreed with the petitioner's position that his appeal should be heard on the merits. See 532 U.S. at 761-62. But if jurisdictional notice-of-appeal requirements were subject to forfeiture, the respondent's express *concession* would have ended the matter. See also *Houston v. Lack*, 487 U.S. 266, 269-70 (1988) (addressing whether a notice of appeal was untimely even though untimeliness was not raised by appellee); *Foman v. Davis*, 371 U.S. 178, 179-80 (1962) (same).

Congress's continual acquiescence to the Court's longstanding interpretation of appeals deadlines evinces its intent that such deadlines be treated as jurisdictional hurdles. The Court gives particular weight to *stare decisis* in statutory interpretation, since Congress could amend its statute to supercede judicial precedent. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). When Congress has not only remained silent but also reenacted statutory language after a judicial interpretation of that language, the implication of congressional acquiescence is even stronger: "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midatlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1985). The Court "assume[s] that Congress is

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Brooks v. Norris, 52 U.S. 204 (1850). This suggestion has been overruled by the many later cases to the contrary.

aware of existing law when it passes legislation," *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), and Congress "thus adopts the existing interpretation unless it affirmatively acts to change the meaning," see *Fla. Nat'l Guard v. Fed. Labor Relations Auth.*, 699 F.2d 1082, 1087 (citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)); see also *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954). In the face of repeated judicial interpretations of the appeal deadline provisions as mandatory and jurisdictional, Congress has never sought to correct the Court or amend its own approach. Thus, the Court should recognize in this congressional acquiescence an affirmative legislative intent to make timely appeal a jurisdictional prerequisite.

The Court should reject Bowles's attempt to disrupt the settled understanding of appeal deadlines as jurisdictional, as he offers no authority for the radical departure. Bowles suggests that the Court has already taken steps in this direction, and he cites as support the Court's language in *Kontrick v. Ryan*, 540 U.S. 443 (2004), and *Eberhart v. United States*, 126 S. Ct. 403 (2005), noting the overuse of the term "jurisdictional" to describe deadlines that were not, in fact, jurisdictional. But *Kontrick* and *Eberhart* do not support Bowles's cause, as the critical difference between those cases and this one is that neither involved *notices of appeal*.[5] Notices of appeal differ from other deadlines in significant ways.

First, unlike the deadlines at issue in *Kontrick* and *Eberhart*, appeal deadlines control when jurisdiction over a case transfers from the district to the appellate court. In each

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[5] Indeed, since *Eberhart* and *Kontrick*, the only other circuit court (besides the court below) to address directly whether an untimely appeal notice remains a jurisdictional defect has answered the question in the affirmative. See *Alva v. Teen Help*, 469 F.3d 946, 948 (10th Cir. 2006).

of the Court's recent cases addressing the misuse of "jurisdiction" to describe mere "claim-processing rules," the lower federal court had already established jurisdiction over the case when the relevant procedural violation occurred. None of these cases dealt with a situation, like here, where an appellant seeks to move his case from the jurisdiction of one court to another. For example, in *Kontrick*, a bankruptcy court obtained jurisdiction over a Chapter 7 liquidation proceeding when a debtor filed a Chapter 7 petition. 540 U.S. at 446. One of the debtor's major creditors later filed an untimely complaint objecting to the debtor's discharge. Only after the bankruptcy court decided against the debtor on the merits did the debtor argue the untimeliness of the creditor's petition. *Id.* The Court concluded that the creditor's untimely filing did not deprive the bankruptcy court of jurisdiction. *Id.* at 452-56. In *Eberhart*, 126 S. Ct. at 405, the Court evaluated provisions "virtually identical" to those at issue in *Kontrick*: the rules governing when a defendant could move for a new trial. The Court ruled that the district court did not lack "jurisdiction" to grant an improper motion for a new trial; but there the district court had had jurisdiction over the case before the untimely motion. *Id.* See also *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004) (holding that an untimely application for legal fees is not jurisdictionally defective, because the application was made in the court that *already* had plenary jurisdiction over the civil action). Here, by contrast, Bowles never triggered the Sixth Circuit's jurisdiction, because he failed to file a timely notice of appeal. Cf. *Griggs*, 459 U.S. at 58-61.

Second, not only does the notice of appeal serve the singular function of shifting jurisdictional authority from one court to another, but the timing of a notice of appeal is expressly set by Congress. No recent Court case dealt with *statutory* time limits, which evidence a congressional intent to limit the class of cases that a federal court may hear. In

Kontrick, the Court observed that "*no statute* . . . specifies a time limit for filing a complaint objecting to the debtor's discharge," and that the time prescriptions are set forth only in the Federal Rules of Bankruptcy Procedure. 540 U.S. at 448 (emphasis added). Likewise, Federal Rule of Criminal Procedure 33, the Rule at issue in *Eberhart*, 126 S. Ct. at 403-05, has no statutory analog. But when a deadline for appeal *is* set forth by statute, the Court has called it jurisdictional, even post-*Kontrick*. See *Hibbs*, 542 U.S. at 99 (stating "we have jurisdiction" to hear appeal that was timely filed under 28 U.S.C. § 2101(c)).

Indeed, *Kontrick* itself supports the position that a statutorily based deadline may be properly considered jurisdictional. Noting that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction," the *Kontrick* Court concluded that a deadline set forth in the Bankruptcy Rules was not jurisdictional and therefore an untimeliness argument premised on the rule was subject to forfeiture. 540 U.S. at 453-56. The Court observed that the deadline was part of the rules "prescribed by this Court for the practice and procedure in cases under title 11," and stated that it was "'axiomatic' that such rules "do not create or withdraw federal jurisdiction." *Id.* at 453. Significantly, the Court, in so holding, contrasted such court rules with federal statutes containing built-in deadlines, such as 28 U.S.C. § 2401(b) and, most notably, 28 U.S.C. § 2107(a).

Consistent with this understanding, the Court has placed jurisdictional significance on the distinction between rules and statutes in the context of certiorari deadlines. The 90-day deadline for certiorari petitions in criminal cases is set forth only by the Court's own rules, and the Court has thus held it is not jurisdictional. *Schacht v. United States*, 398 U.S. 58, 63-64 (1970). The 90-day deadline for civil appeals, by contrast, is set forth by statute at 28 U.S.C. § 2101(c), and the Court has repeatedly referred to that deadline as

jurisdictional. See, e.g., *Missouri v. Jenkins*, 495 U.S. at 45; *Fed. Election Comm'n*, 513 U.S. at 90-91. Even after the Court's caveat in *Kontrick* that courts and parties should facilitate clarity by avoiding inappropriate use of the word "jurisdiction," see 540 U.S. at 455, the Court has continued to refer to § 2101(c) as a jurisdictional deadline, see *Hibbs*, 542 U.S. at 99. The Court observed that only Congress can define the jurisdiction of the federal courts, and that the purpose of the Rules is simply to give effect to congressional intent in defining that jurisdiction. See *id.* at 98-99.

Similarly, reaffirming that 28 U.S.C. § 2107 is likewise a jurisdictional statute would effectuate Congress's intent in enacting the statute. In *Browder*, the Court noted:

> The purpose of the rule is clear: It is "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."

434 U.S. at 264 (quoting *Matton*, 319 U.S. at 415); see also *Barnhart*, 537 U.S. at 159 n.6 (characterizing § 2107 as a jurisdictional statute, and noting that such determinations are made by examining "contextual and historical indications of what Congress meant to accomplish."). The long history of jurisdictional treatment by the Court and congressional acquiescence also demonstrates that § 2107 is intended to be jurisdictional. Permitting untimely appeals in the circuit courts would defeat the congressional purpose of setting a definitive end point to litigation in federal court, and the Court should therefore hold that § 2107, just like § 2101, sets forth a jurisdictional deadline for taking an appeal.

Finally, NACDL is unpersuasive in suggesting that, even if the standard 30-day deadline for filing an appeal is

jurisdictional, the 14-day time limit for reopening the appeal is separately nonjurisdictional, even though the twin limits both arise under Rule 4(a) and under § 2107. Nothing in the text of the rule or the statute supports the idea that these related provisions have such fundamentally different natures; nothing indicates that Congress intended to treat the two deadlines differently. Further, neither Congress nor the Court would have a reason to create such a distinction, because both subsections accomplish the same jurisdictional purpose of transferring a case from the district to the appellate court, and both are concerned with enforcing the goals of finality necessary for any effective legal system. NACDL suggests the 14-day deadline is different because, it says, the putative appellant's motion to reopen serves to notify the putative appellee of the intent to appeal. But if actual notice to the parties were the sole concern underlying notice-of-appeal requirements, a litigant could successfully circumvent the notice-of-appeal deadline upon a mere showing that he notified his party-opponent, formally or informally, that he intended to appeal. Such an approach would effectively eviscerate any notice-of-appeal deadlines.

2. Even if an appeal deadline is not "jurisdictional," its satisfaction is a mandatory and nonforfeitable precondition to a court's exercise of appellate jurisdiction.

Even if the Court does not attach the label "jurisdiction" to describe a court's lack of authority to hear untimely appeals, the Court should reach the same practical result: Circuit courts not only *may*, but *must*, dismiss untimely appeals. Even if appeal deadlines are not part of subject-matter jurisdiction per se, they are nevertheless mandatory preconditions to appellate jurisdiction, and their violation creates the same categorical bar to circuit court review as would an absence of subject-matter jurisdiction. Thus, it matters little to the result here whether such

deadlines are called "jurisdictional" or some other word: The Sixth Circuit was obligated to dismiss Bowles's appeal regardless of whether it believed the State should have spoken up in district court.

Although the Court has recently suggested in dicta that the term "jurisdictional" should not be used to describe time limits, see *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 1242 (2006), the notice-of-appeal deadline, unique among other deadlines, operates in a distinctly jurisdictional fashion. That is, the notice of appeal triggers the beginning of an appeal, and the beginning of a court of appeals's consideration of the case or controversy. The Court recognizes, therefore, that a district court loses authority over a case once a party has taken an appeal to the circuit court. See, e.g., *Carlisle v. United States*, 517 U.S. 416, 430-31 (1996). Likewise, the Court recognizes that, if a party appeals to the circuit court but then files a postjudgment motion in district court to alter or amend the judgment, the appellate court is divested of jurisdiction and the district court regains jurisdiction. See, e.g., *Stone v. INS*, 514 U.S. 386, 406 (1995). Thus, a circuit court does not have jurisdiction over a case unless and until a party actually appeals to the circuit court. "And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act." *Griggs*, 459 U.S. at 61.

In light of this distinctive role that the notice of appeal serves, this Court and lower courts have repeatedly referred to a notice-of-appeal deadline as a "prerequisite" or "precondition" to invoking appellate court jurisdiction. In *Coppedge v. United States*, 369 U.S. 438, 442 n.5 (1962), the Court characterized the appeal deadline as "a jurisdictional prerequisite for perfecting an appeal." In *Fallen v. United States*, 378 U.S. 139, the Court again called it a "jurisdictional prerequisite." In the similar context of another notice-of-appeal requirement—namely, Rule 3's requirement to name the appellee, which the Court deemed mandatory

until the Rule's revision—the Court observed, "the failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a *failure of that party to appeal*." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (emphasis added).

Lower courts have also described the notice-of-appeal deadline in terms of a prerequisite to appellate court jurisdiction. As the Seventh Circuit has stated,

> [T]he rules of appellate procedure have the force of law, 28 U.S.C. § 2072, and Rules 3 and 4 state conditions precedent for the *exercise* of the appellate jurisdiction granted by Article III and 28 U.S.C. § 1291. Although these conditions precedent are spoken of as 'mandatory and jurisdictional,' [citing *Browder*], the more precise effect of the rules is to state the conditions which *invoke* the jurisdiction of the court.

Young Radiator Co. v. Celotex Corp., 881 F.2d 1408, 1415 (7th Cir. 1989). The Fifth Circuit has similarly characterized Rule 4(a)'s satisfaction as a "mandatory precondition to the exercise of jurisdiction." *Sanchez v. Bd. of Regents of Tex. S. Univ.*, 625 F.2d 521, 522 n.1 (5th Cir. 1980). "Mandatory preconditions to the exercise of jurisdiction are often spoken of as jurisdictional . . . in the sense that absent compliance, the court cannot acquire jurisdiction of the cause, though otherwise it is a case within the court's subject matter jurisdiction or, as it is sometimes called, 'competence.'" *Mann v. Lynaugh*, 840 F.2d 1194 (5th Cir. 1988). Thus, even if it does not deprive the circuit court of subject-matter jurisdiction, an untimely notice of appeal is of "jurisdictional significance," *see Griggs*, 459 U.S. at 58, because the case was never properly before the court.

Viewing an appeal deadline as a jurisdictional "prerequisite" instead of a jurisdictional element does not

alter the conclusion that such deadlines are nonforfeitable. Regardless of the proper term that attaches to such preconditions to jurisdiction, courts have treated proper satisfaction of jurisdictional preconditions as a relevant issue whenever it is raised. See *Becker*, 532 U.S. at 762; *Mann*, 840 F.2d at 1197.

Thus, when a circuit court hears an untimely appeal, it does not simply err; rather, it acts outside the scope of its authority bestowed by Congress. Regardless of whether this lack of authority is labeled "jurisdictional," circuit courts must dismiss untimely appeals even if the opposing party does not raise untimeliness. The Sixth Circuit fulfilled this duty when it dismissed Bowles's untimely appeal.

C. Even if not obligated to dismiss Bowles's untimely appeal, the Sixth Circuit committed no error in doing so.

Even if appeals deadlines were not jurisdictional or jurisdictional in nature, the Sixth Circuit did not err in dismissing Bowles's appeal, because the State properly raised the argument and because, in any event, the circuit courts retain the inherent power to dismiss untimely appeals.

1. The State properly raised the issue of Bowles's untimely appeal.

Even if the deadline set forth in Rule 4 and § 2107 is viewed as a mere affirmative defense, the State properly raised the defense in its appellee brief. Forfeitable defenses must generally be raised in a party's first responsive pleading. See *Kontrick*, 540 U.S. at 458; see also *Day v. McDonough*, 126 S. Ct. 1675, 1679 (2006) (noting that an affirmative defense at the trial court level "is forfeited if not raised in a defendant's answer or in an amendment thereto").

Bowles's claim that the State has somehow forfeited the issue is erroneous, for the State properly raised the issue of Bowles's untimely notice of appeal. In its first pleading before the Sixth Circuit, the State explained its objection to jurisdiction:

> This Court lacks jurisdiction to hear this appeal . . .
>
> . . . .
>
> On February 26, 2004, through counsel, Bowles filed a notice of appeal. The Sixth Circuit correctly noted [in its show cause order] that the federal district court was only permitted to reopen the appeal period for a period of fourteen (14) days, or until February 24, 2004, and ordered Bowles' counsel to show cause why the appeal should not be dismissed for lack of jurisdiction.
>
> Correctly noting that Fed.R.App. [sic] 4(a)(6) is a mandatory and jurisdictional prerequisite, the Sixth Circuit dismissed the appeal as it applied to the Judgment filed July 28, 2003 and the Order of September 9, 2003, but graciously concluded that the appeal was timely as to the February 10, 2004 ruling . . . .
>
> . . . .
>
> This Court lacks jurisdiction to hear an appeal from any judgment denying Bowles' claims on the merits.

Respondent's 6th Cir. Br. at 1-4 (internal citations to record omitted). After the State raised the jurisdictional issue, however, Bowles replied by saying nothing. That is, Bowles declined to file a reply brief at all, forgoing his chance to address the untimeliness issue. The Sixth Circuit, in an extensive examination of the deadlines set forth in Fed. R.

App. P. 4(a)(6) and 28 U.S.C. § 2107, entered a final judgment dismissing the appeal as untimely. JA 175-92.

Only after dismissal did Bowles complain of the State's alleged forfeiture of the Rule 4(a)(6) argument. Although Bowles now insists that the State objected too late, he has never identified the precise point at which he thinks the State should have raised the untimeliness argument. He simply repeats a misleading objection that the State did not raise the untimeliness issue until thirteen months after Bowles filed his notice of appeal. The length of time, however, is irrelevant. Rather, the only germane issue for determining forfeiture is whether the State fulfilled its duty to raise the timeliness issue in its first responsive pleading. And here, it assuredly did. Indeed, a review of each step of this case's procedural history shows that the State had no obligation to raise the time bar argument any sooner than it did.

a. The State was not required to object to Bowles's untimely appeal in district court.

As a general matter, if Bowles is objecting to the State's failure to raise the timeliness issue in district court, then he is, in effect, arguing for a very strange role reversal. Under that view, the appellees, and not appellants, have the duty to ensure that appeals get filed in time, even though appellees have no interest in seeing appeals get filed at all.

Bowles also fails to identify any specific Rule that would have provided an appropriate vehicle for the State's intervention in district court. Even if one accepts the questionable proposition that a motion under Civil Rule 52(b), 59, or 60 may be used to challenge procedural orders such as the one here, as opposed to final judgments, such a motion would have run counter to the State's interest in holding Bowles to the 14-day limit because it would have tolled the time for Bowles's appeal. See Fed. R. App. P. 4(a)(4). If Bowles is suggesting that the State should have

proactively sought a resolution not expressly contemplated by the Rules, he cannot realistically argue that the State's failure to take such action should constitute forfeiture. The State cannot be held to a mandatory duty to pursue procedures not set forth in the Rules.

Equally problematic, any suggestion that the State must object in district court—or risk forfeiture—undermines the limits imposed by Appellate Rules 4 and 28 U.S.C. § 2107 on the power of district courts to grant such extensions, because it effectively gives district courts the power to grant extensions subject only to the opposing party's objection. See also Fed. R. App. P. 26(b). Requiring parties to object to unauthorized appeal extensions, lest the extensions take effect, creates an unsound duty for an appellee to act against its own interest, and would also give the district courts a de facto power that the Rules explicitly deny them.

b. The State was not required to object to Bowles's untimely appeal in the Sixth Circuit before filing its merits brief.

In federal circuit court, a party must raise any argument upon which it seeks to rely in its first merits brief. See Fed. R. App. P. 27; see also *Kontrick*, 540 U.S. at 458. Thus the State properly raised its argument in its appellee merits brief. Bowles suggests that the State should have raised the untimeliness issue before filing its appellee's brief, but again, he does not identify the precise point when the State's duty supposedly arose. To confirm that no such earlier point existed, the following step-by-step analysis examines other pleading options and shows that the State was not required to raise the issue at any point before its merits brief.

First, the State did not err by failing to move to dismiss Bowles's appeal. Sixth Circuit Rule 27(e)(1) provides that a party *may* file a motion to dismiss. The Rule does not *require* that a party file, nor does the Rule provide that a party

forfeits a defense by not filing a motion to dismiss. The permissive nature of the rule thus gives any appellee the option of moving to dismiss for lack of jurisdiction or reserving the same defense until its first responsive pleading. The same Rule also provides that "[m]otions to dismiss ordinarily may not be filed on grounds other than lack of jurisdiction." Here Bowles cannot have his proverbial cake and eat it too. The untimeliness issue is either jurisdictional or it is not. If notice-of-appeal deadlines are jurisdictional, then the State was not obliged to move to dismiss in order to preserve the issue, because jurisdiction is nonforfeitable. But if appellate deadlines are not jurisdictional, then the State was prohibited from moving to dismiss under Sixth Circuit Rule 27. In sum, filing such a motion was either barred or, at most, was optional, but was surely not required.

Second, the State had no duty to respond to a show-cause order directed at another party. Seven days after docketing his appeal, the Sixth Circuit clerk's office sua sponte ordered Bowles to show cause why his appeal was not timely filed. The court did not ask for, nor do the Appellate Rules or Sixth Circuit rules contemplate, a filing by the party not involved in the show-cause proceeding. Moreover, nothing in the rules covers whether, when a court orders a party to show cause, the opposing party is even *entitled* to participate as well. It would have been entirely inappropriate for the State to interject itself into what is essentially a dialogue between the circuit court and the violating party.

Third, the circuit court's decisions of March 10, 2004, dismissing most of Bowles's appeal, and September 8, 2004, denying Bowles a certificate of appealability, were favorable to the State. The State had absolutely no interest in upsetting these decisions. And requiring an appellee to object after a favorable decision and remind the appellant to file on time makes little sense. The State would be re-raising an issue that

had been decided in its favor and acting against its own interests.

Fourth, the State was not *able* to respond to Bowles's September 16, 2004, petition. In that filing, Bowles sought reconsideration of the circuit court's denial of his certificate of appealability. On December 28, 2004, the court granted his request and issued a certificate of appealability pursuant to Appellate Rule 40, without seeking an answer from the State. Under Appellate Rule 40, "unless the court requests, no answer to a petition for panel rehearing is permitted."

Fifth, prudence counsels against requiring—or even expecting—the State to file another petition for rehearing after Bowles's petition for rehearing. The Rules do not address whether a party can appeal from the *grant* of a certificate of appealability, or whether a party can file a *second* petition for rehearing following an unfavorable panel decision upon rehearing. And if multiple petitions are allowed, when does the process end? Logically, the petitions-for-rehearing stage could go on ad infinitum. Instead, in the interest of judicial economy, once Bowles received relief under Appellate Rule 40, the State simply acted efficiently and in accord with its true duty by briefing the timeliness issue during its first required pleading.

Because the State properly raised the untimeliness issue in its appellee merits brief, the Court could affirm the Sixth Circuit's dismissal without addressing either the jurisdictional nature of the rule or the scope of the Sixth Circuit's inherent powers.

2. An appellate court may raise notice-of-appeal deadlines sua sponte.

Even if the Court holds that notice-of-appeal deadlines are nonjurisdictional, and even if the State had forfeited its untimeliness argument, the Sixth Circuit still maintains its

inherent authority to raise the issue sua sponte. Moreover, in state habeas cases like this one, the principles of comity, federalism, and finality counsel in favor of protecting the court's prerogative to invoke claim-processing rules to protect state interests. Thus, the Sixth Circuit acted within the scope of its inherent authority by dismissing Bowles's appeal, and this Court should affirm the dismissal.

a. Appellate courts, by virtue of their inherent powers, may sua sponte dismiss appeals for lack of timeliness.

No rule, statute, constitutional provision, or other authority presented by Bowles denies the inherent authority of the appellate court to raise untimeliness sua sponte. In fact, the NACDL admits that, even if the Court concludes § 2107 is not jurisdictional, "that does not necessarily mean the court erred in dismissing the appeal as untimely," since "[e]ven nonjurisdictional rules are binding on parties and courts and noncompliance may support dismissal of an action or an appeal in appropriate circumstances." NACDL Br. at 16.

From the inception of the federal courts, "it has been understood that 'certain implied powers must necessarily result to our [c]ourts of justice from the nature of their institution.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52 (1991), quoting *United States v. Hudson*, 11 U.S. 32, 34 (1812). Accordingly, the Court has long recognized that federal courts have inherent powers distinct from those granted by statute. See, e.g., *Ex Parte Peterson*, 253 U.S. 300, 312 (1920) (finding the appointment of auditors is authorized by the courts' "inherent power to provide themselves with appropriate instruments required for the performance of their duties"); *Cooke v. United States*, 267 U.S. 517, 539 (1925) (recognizing a court's inherent power to sanction contempt); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629 (1962) (describing a court's inherent authority to

sua sponte dismiss an action due to a party's failure to prosecute); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980) (recognizing a court's inherent power to assess attorney fees). A court's inherent powers include all powers reasonably required to enable a court to perform its judicial functions efficiently and make its lawful actions effective. See John Cratsley, *Inherent Powers of the Courts* 2 (1980).

The exercise of inherent powers is "essential to the administration of justice," *Michaelson v. United States*, 266 U.S. 42, 65 (1924), and "absolutely essential for the functioning of the judiciary," *Levine v. United States*, 362 U.S. 610, 616 (1960). The inherent powers of federal courts cannot be dispensed with because they "are necessary to the exercise of all others." *Roadway Express*, 447 U.S. at 764 (citing *Hudson*, 11 U.S. at 34). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-631.

i. The administration of justice is best served by protecting the appellate courts' power to enforce notice-of-appeal deadlines sua sponte.

The question here is whether the federal appeals courts maintain the inherent authority to enforce appellate deadlines and thus to control their dockets. This issue could be resolved in at least three distinct ways, including the options the Court analyzed in *Granberry v. Greer*, 481 U.S. 129 (1987) and *Day*, 126 S. Ct. 1675. First, the Court might conclude, as Bowles urges, that courts are powerless to enforce any appellate deadlines that a party has not defended with adequate vigor. Second, the Court could insist, as we urge above, that circuit courts dismiss any appeals that are not

timely made under Appellate Rule 4(a). Or, third, the Court could adopt an intermediate approach, as in *Granberry* and *Day*, which allows the appellate courts in each case to decide whether the administration of justice is better served by dismissing the case on inflexible claim-processing grounds or by reaching the merits of the petitioner's appeal.

In *Day*, 126 S. Ct. 1675, the Court considered whether a federal court may sua sponte dismiss a petition for habeas after the State, in its answer, had improperly admitted that the petition was timely. Petitioner Day had filed a habeas petition pursuant to 28 U.S.C. § 2254. In its answer, the State wrongly conceded the petition was timely due to statutory tolling. The magistrate judge independently inspected the pleadings, and found that the State had miscalculated the tolling time and, therefore, the petition was untimely. After giving Day a chance to show cause, the magistrate recommended dismissal. The district court agreed and dismissed the case.

The Court upheld the sua sponte dismissal of Day's habeas petition, concluding that a court is "permitted, but not obliged" to dismiss sua sponte an untimely petition. *Id.* at 1681. That was so not only where a State failed to object, but even where, as in *Day*, the State had expressly (but erroneously) conceded timeliness. Although the courts "surely have no obligation to assist attorneys representing the State," nevertheless "if a judge does detect a clear computational error, no Rule, statute, or constitutional provision commands the judge to suppress that knowledge." *Id.* at 1684. The Court reached this decision despite the State's acknowledgement that the Antiterroism and Effective Death Penalty Act of 1996's statute of limitations was not jurisdictional and could, presumably, be forfeited. *Id.* at 1681.

Similarly, though the State vigorously disputes that its assertion of the timeliness issue was belated, even if the State had completely failed to raise the issue, nothing would preclude the Sixth Circuit from exercising its inherent authority to enforce Fed. R. App. P. 4(a)(6) and 28 U.S.C. § 2107's time limitations sua sponte.

ii. *Kontrick* and *Eberhart* do not restrict the appellate courts' power to enforce notice-of-appeal deadlines sua sponte and thus to control their dockets.

Bowles claims that *Kontrick* and *Eberhart* support his view that an appellate court lacks the authority to raise sua sponte a failure to comply with the provisions of Appellate Rule 4(a) and 28 U.S.C. § 2107. He is wrong. Whatever those cases may mean about the proper terminology for the time limits for filing an appeal, nothing in *Kontrick* or *Eberhart* diminishes the federal appellate courts' inherent power to sua sponte enforce their own rules.

Nor is an appellate court's inherent authority to consider forfeited defenses sua sponte diminished by this Court's decisions in *Kontrick* and *Eberhart*. These cases, which allow for the forfeiture of claim-processing rules not raised by a party, merely specify the circumstances in which the appellate court *may* deem the claim-processing defense forfeited; they do not *require* an appellate court to deem a claim-processing defense forfeited in any set of circumstances. See generally *Kontrick*, 540 U.S. 443, and *Eberhart*, 546 U.S. 12. At most, these cases can be read to allow forfeiture of claim-processing rules, but they do not *require* a court to ignore claim-processing defects. More importantly, nothing in the Court's recent precedents reflects any intent to alter appellate courts' inherent powers to control their dockets.

In addition, stripping the appeals courts of their power to independently enforce nonwaivable notice-of-appeal deadlines would create practical problems. If appeals deadlines are classified as forfeitable but nonwaivable[6] *and* the appellate courts are deprived of their inherent power to enforce these deadlines, this combination would allow parties to manipulate the system to avoid time limits. Parties could silently collude to keep a time-barred appeal alive, and the appellate court would be powerless to act. While it might seem unlikely, at first blush, that an appellee would so conspire against its seeming interests, experience teaches otherwise. "[T]he history of jurisdictional deadlines contains many instances of parties attempting to extend a deadline by agreement, only to have the court intervene and rule it could not be done." See E. King Poor, at 223.[7] The Court should not establish a rule that would allow colluding parties to achieve by silence what they could not by stipulation.

b. In habeas, federal courts have additional authority to sua sponte protect states' interests.

Because this is a habeas case, the appeals court's sua sponte power to enforce deadlines was heightened. The Court has repeatedly held that federal courts have discretion to sua

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[6] Certain claim-processing rules are now subject to forfeiture even when they are not subject to intentional waiver. See *Kontrick*, 540 U.S. at 456. But see *Freytag v. Comm'r*, 501 U.S. 868, 895 (1991) ("A right that cannot be waived cannot be forfeited by other means.").

[7] This article cites, e.g., *Kraft v. United States*, 85 F.3d 602, 603-05 (Fed. Cir. 1996) (sua sponte dismissing appeal as untimely, even though parties argue in favor of hearing appeal); *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 508 (D.C. Cir. 2003) (agency agreed not to object to late appeal), and *Slater v. Peyser*, 200 F.2d 360, 361 (D.C. Cir. 1952) (parties "stipulated" to extension of deadline for post-trial motions after it expired).

sponte raise issues such as a failure to exhaust remedies, a procedural bar, nonretroactivity, or a statute of limitations, even though states are typically expected to raise these matters. Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts (2005); see also, e.g., *Granberry*, 481 U.S. 129 (holding that the federal appellate courts have sua sponte discretion to address the issue of exhaustion despite the state's failure to introduce the defense in the lower court); *Caspari v. Bohlen*, 510 U.S. 383, 393 (1994) ("a federal court may, but need not, decline to apply [the] *Teague* [*v. Lane*, 489 U.S. 388, 310 (1989), nonretroactivity rule] if the State does not argue it."); *Day*, 126 S. Ct. at 1684 (holding that "district courts are permitted, but not obliged, to consider, sua sponte, the timeliness of a state prisoner's habeas petition."); *Long v. Wilson*, 393 F.3d 390, 403 (3d Cir. 2004) ("It is now widely recognized that judges have discretion to raise procedural defenses in habeas cases."). This is because the interests advanced by these defenses, namely comity, federalism, and finality, are institutional interests that extend beyond the interests of the litigants in any particular case.

The federal appellate courts' sua sponte authority to raise the above defenses in habeas should similarly apply to a habeas petitioner's failure to comply with inflexible claim-processing rules. Because claim-processing rules advance the same interests as do other traditional habeas defenses, it is appropriate for federal courts to raise sua sponte inflexible claim-processing rules just as it is appropriate to raise other nonjurisdictional procedural issues. *Day*, 126 S. Ct. at 1681 (noting that the statute of "limitations defense resembles other threshold barriers—exhaustion of state remedies, procedural default, nonretroactivity—courts have typed—'nonjurisdictional,' although recognizing that those defenses 'implicat[e] values beyond the concerns of the parties.'").

Claim-processing rules implicate comity, federalism, and finality, just as exhaustion, nonretroactivity, and other procedural defenses do. The Court has explained that federal and state relations are implicated by *any* federal collateral intrusion on a state court criminal judgment. See *McCleskey v. Zant*, 499 U.S. 467, 490-491 (1991). As *McCleskey* explained, procedural defenses, such as default and abuse of writ, "implicate nearly identical concerns flowing from the significant costs of federal habeas review." *Id.* And while comity and federalism are not directly implicated when a petitioner fails to introduce his claims in the first round of federal review, the Court concluded that procedural defenses are "designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior appropriate time. . . ." *Id.* at 493; see also *Engle v. Isaac*, 456 U.S. 107, 128-134 (1982) (describing how federal interference in state criminal trials frustrates states' sovereign power and noting how federal habeas challenges to state convictions give rise to unique comity concerns).

Further, potential obstacles to habeas relief are not found solely in comity interests; they are also based in the related and equally important interest of protecting final judgments. See *Teague*, 489 U.S. at 309 (application of constitutional rules announced after conviction undermines principle of finality); *McCleskey*, 499 U.S. at 493 (procedural defenses also work to vindicate the State's interest in the finality of its criminal judgments). Like other procedural defenses, such as exhaustion, abuse of writ, and the statute of limitations, application of claim-processing rules furthers the important interest of the finality of judgments.

D. No unique circumstance justifies Bowles's untimely appeal.

Bowles also attempts to avoid the consequences of his late filing by relying on the "unique circumstances" exception, applied in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) and *Thompson v. INS*, 375 U.S. 384 (1964), to the application of strict procedural deadlines. Any attempt to seek relief under the unique circumstances exception, however, must be placed in doctrinal perspective. The Court has not vindicated a unique circumstances claim in over forty years,[8] and has not even discussed the issue in seventeen years, since *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). In addition, *Thompson* itself provoked a strong dissent from four Justices, *Thompson* at 387 (Clark, J. dissenting),[9] and cases decided since *Harris Truck* and *Thompson* have confirmed that the doctrine has very limited application. *Osterneck*, 489 U.S. at 179; see also *Houston v. Lack*, 487 U.S. at 282 (Scalia, J., dissenting) (noting that cases decided since *Harris Truck* have repudiated any notion that the doctrine should apply to the late filing of notices of appeal.)

Not surprisingly then, the courts of appeals are virtually unanimous in concluding that the doctrine is "disfavored" and/or is on "shaky grounds."[10] And few cases in the courts

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[8] The only case since *Harris* and *Thompson* in which the Court allowed a unique circumstances exception was its summary reversal in *Wolfsohn v. Hankin*, 376 U.S. 203 (1964), reversing *Wolfsohn v. Hankin*, 321 F.2d 393, 394 (D.C. Cir. 1963).

[9] Justice Clark's dissent was joined by Justices Harlan, Stewart, and White. See also *Wolfsohn* at 396 (Clark, J., dissenting) (joined by Justices Harlan, Stewart, and White).

[10] See, e.g., *Davignon v. Clemmey*, 322 F.3d 1, 10-11 (1st Cir. 2003) (noting that "the viability of the *Thompson* doctrine remains in considerable doubt" and referring to its "enigmatic nature"); *United States v. Canova*, 412 F.3d 331, 346 n.17 (2d Cir. 2005) (noting that

of appeals have actually excused a litigant's untimely filing under the unique circumstances exception. See *Fogel v. Gordon & Glickson, P.C.*, 393 F.3d 727, 731-32 (7th Cir. 2004) (noting that unique circumstances claims are rarely invoked successfully). In short, Bowles faces a difficult task in trying to achieve relief under this extraordinarily narrow exception.

And to the extent that the unique circumstances exception retains any vibrancy at all, Bowles is an especially poor candidate for invoking it for three separate reasons. First, Bowles presents no equitable considerations that would justify his claim for such extraordinary equitable relief. Second, Bowles does not satisfy the specific requirements

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"continued vitality" of doctrine has been questioned by sister circuits); *Kraus v. Conrail*, 899 F.2d 1360, 1364-65 (3d Cir. 1990) (stating that "the scope of the 'unique circumstances' rule remains murky" and referring to its "foundations" as "tenuous"); *Panhorst v. United States*, 241 F.3d 367, 371-72 (4th Cir. 2001) (questioning continued vitality of doctrine); *Cousin v. Lensing*, 310 F.3d 843, 848 n.3 (5th Cir. 2002) (questioning whether unique circumstances doctrine "remains good law"); *In re Bond*, 254 F.3d 669, 674 (7th Cir. 2001) (questioning continued vitality of doctrine); *Arnold v. Wood*, 238 F.3d 992, 996 (8th Cir. 2001) (noting that the four-Justice dissent in *Houston v. Lack* "questioned [the unique circumstances doctrine's] continuing vitality"); *Anderson v. Mouradick*, 13 F.3d 326, 329 n.5 (9th Cir. 1994) (noting that "[r]ecent Supreme Court decisions have cast doubt upon the viability of the unique circumstances doctrine" and "[o]ther courts have questioned its continuing vitality"); *Home & Family v. Eng. Res. Corp.*, 85 F.3d 478, 481 (10th Cir. 1996) ("whatever the precise contours of the 'unique circumstances' exception may be, it is a disfavored doctrine that is to be applied only in 'carefully limited circumstances.' (citation omitted)"); *Hollins v. Dep't of Corr.*, 191 F.3d 1324, 1327 (11th Cir. 1999) (referring to "the Supreme Court's shaky support for the [unique circumstances] doctrine"); *United States v. Marquez*, 291 F.3d 23, 28 (D.C. Cir. 2002) (noting that Supreme Court has not applied doctrine since 1964 and asserting that "[i]ts ongoing vitality is far from assured.").

necessary to trigger consideration of the unique circumstances exception as set forth by the Court in *Osterneck*. Third, the unique circumstances exception does not apply, in any event, to the late filing of notices of appeal.

1. Bowles does not raise an equitable claim for relief.

The unique circumstances exception is, of course, an equitable doctrine, but Bowles presents no compelling equitable reason why he should be granted this relief. Bowles was certainly aware that Appellate Rule 4(a)(6) imposed a 14-day deadline: He not only moved to reopen the time to appeal under this provision, but he also quoted the rule, including the 14-day limit, *verbatim* in his motion. See JA 148. Accordingly, Bowles could have and should have noticed that the district court's handwritten notification listed a new deadline that was 17 days, not 14 days, from the date of the order. And Bowles offers no reason why he would have needed three extra days to file the notice in the first place. Unlike the petitioner in *Harris Truck*, Bowles did not need any time to decide whether or not to appeal:[11] He presumably had already made that decision when he filed his motion to reopen. Unlike the petitioner in *Thompson*, see 375 U.S. at 385, Bowles did not need more time to move and to argue for a new trial. He needed only to file a simple notice of appeal. Indeed, while the petitioners in both *Harris Truck* and *Thompson* took some action during the period in which their time to file a notice of appeal was pending (in *Harris Truck* to seek an extension, 371 U.S. at 216, and in *Thompson* to move for a new trial, 375 U.S. at 385), Bowles did nothing other then let the 14-day period pass. This is not

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[11] In *Harris Truck* the petitioner asked for more time to file its notice of appeal because the corporate officer charged with making litigation decisions was on vacation and unreachable. 371 U.S. at 215.

the sort of equitable consideration that merits unique circumstances relief.

2. Bowles does not meet the *Osterneck* test for establishing unique circumstances.

Bowles not only fails on general equitable principles, but he also fails to meet the specific requirements under *Osterneck* to trigger consideration of the unique circumstances exception. In *Osterneck*, the Court held that the unique circumstances exception "applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." 489 U.S. at 179.

Bowles fails on both *Osterneck* factors. First, Bowles did not perform any "act" that would postpone the deadline for filing. As the Sixth Circuit correctly observed, he never sought (properly or otherwise[12]) an extension from the 14-day time limit of Rule 4(a)(6) to file his notice of appeal. See JA 188. Second, the district court did not, in any meaningful sense, assure Bowles that he could have an extension. See *id.* The district court merely wrote the wrong deadline in the margin of its order.

Bowles's failure to meet *Osterneck's* requirements demonstrates the essential weakness of his claim. The doctrine of unique circumstances is about reasonable reliance. It is not about taking advantage of district court errors. See, e.g., *Feinstein v. Moses*, 951 F.2d 16 (1st Cir. 1991) ("[T]he scope of the exception must focus upon whether the appellant's professed reliance on the actions of

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[12] Even if Bowles had asked for a 17-day extension, it would not have been a proper request, since requests for forbidden extensions can never be "properly done." See *Panhorst*, 241 F.3d at 372-73; *Weitz v. Lovelace Health Sys., Inc.*, 214 F.3d 1175, 1180 (10th Cir. 2000).

the district court was objectively reasonable."); *Pinion v. Dow Chem., U.S.A.*, 928 F.2d 1522 (11th Cir. 1991) ("[r]easonable reliance has always been a necessary prerequisite to an invocation of the 'unique circumstances' exception.").

Here, Bowles give no sound reason why it was reasonable for him to rely on the district court's unexplained use of a date that reflected three bonus days beyond what the rule allowed. The district court's notational error, unlike the district courts' errors in *Harris Truck* and *Thompson*, was not the result of a court's deliberative action granting a party its requested relief. Rather, it was a simple miscalculation that directly conflicted with the governing rule. All Bowles needed to do was to read Rule 4(a)(6)—or read his own motion, which quoted the rule and properly asked for only 14 days—to discover the error.

Not surprisingly, the appeals courts have held that any reliance is not reasonable when a district court acts in clear violation of the rules. As Judge Posner stated in *Fogel*, 393 F.3d at 731, "when a rule is unambiguous a litigant is not permitted to rely on erroneous advice, even by a court." *Id.* at 731. Similarly, in *Pinion*, the defendant-appellants relied on a district court's improper decision granting their motions to enlarge the time for filing Civil Rule 50(b) and 59 motions. In denying relief, the *Pinion* court stated:

> The reasonableness of [defendant-appellant's] reliance on the action of the district court is severely undercut by the ease with which it could have read Rule 6(b). Simply scanning the Rule would have provided notice that there was an inconsistency between the Rule's text and the court's consent order.

928 F.2d at 1534; see also *Weitz v. Lovelace Health Sys. Inc.*, 214 F.3d 1175, 1180 (10th Cir. 2000) ("[T]he mere fact that a court has granted . . . an extension does not justify reliance that is clearly at odds with the text of the rules").

The courts' reluctance to allow litigants to take advantage of such obvious errors, moreover, is supported by compelling policy concerns. As the Tenth Circuit stated in *Weitz*:

> It makes great practical sense to require the parties to comply with clearly mandated requirements in the Federal Rules. Otherwise, we would be encouraging litigants to invite courts to commit easily avoidable errors. District courts today suffer under a burdensome caseload, and a certain degree of cooperation and assistance from litigants is essential to the judicial system's effective operation.

214 F.3d at 1180. Here, too, Bowles should not be permitted to absolve himself from the responsibility of complying with clearly stated rules merely because the district court committed an obvious error. Indeed, as *Weitz* implies, allowing parties to invoke the unique circumstances exception in the case of obvious error would read the "unique" requirement out of the doctrine because of the frequency of district court mistakes caused by burdensome caseloads. *Id.*

3. The unique circumstances exception does not apply to the filing of late notices of appeal.

Bowles's invocation of the unique circumstances doctrine should also be rejected for the simple reason that the doctrine does not apply to the late filing of notices of appeal. First, as noted above in Part B.1, Rule 4(a)(6) is jurisdictional. Accordingly, equitable exceptions do not

apply. See *Owen Constr. & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978) (holding that equitable estoppel would not prevent a party from defeating diversity jurisdiction by claiming, on the third day of trial, that it was from the same state as the plaintiff even though it had previously asserted it was from a different state and even though the defeat of jurisdiction might bar the plaintiff from pursuing her action altogether because of the passage of the statute of limitations).

Second, neither *Harris* nor *Thompson* stands for the proposition that the unique circumstances exception can excuse a direct violation of notice-of-appeal time requirements. In both *Harris* and *Thompson*, the district court's errors involved tolling provisions and not the appeal deadline itself. In *Harris*, the district court issued an erroneous legal conclusion regarding whether the time to appeal could be tolled because of excusable neglect. 371 U.S. at 216-17. In *Thompson*, the district court incorrectly concluded that the petitioner had complied with time requirements regarding his filing a motion for a new trial, a motion which, if made properly, would have also tolled the time to appeal. 375 U.S. at 385, 387. Neither case held that the violation of a direct time requirement for filing a notice of appeal could be excused by unique circumstances.

This distinction makes a difference. The decision whether or not the period to file a notice of appeal can be tolled, like many district court decisions that affect the time it takes for a case to proceed to an appellate court, is properly within the district court's authority. The time for filing a notice of appeal, however, directly governs the boundaries between the district and the appellate courts, and is therefore beyond a district court's authority. Indeed, even if there were any doubt as to whether *Harris Truck* and *Thompson* could be read to excuse a litigant from a direct violation of notice-of-appeal time requirements, that doubt has been erased in

later cases. As four members of the Court explained in *Houston v. Lack*, 487 U.S. 266, cases decided since *Harris Truck* and *Thompson* have "effectively repudiate[d]" any notion that the unique circumstances doctrine allows any exception from requirements governing the timely filing of notices of appeal. *Houston*, 487 U.S. at 282 (Scalia, J., dissenting) (citing *Griggs*, 459 U.S. 56, and *Browder*, 434 U.S. 257).

Third, applying the unique circumstances exception to the late filing of notices of appeal would undermine the mandate set forth in Fed. R. App. P. 26(b) that "the court may not extend the time to file a notice of appeal." If a district court's enlargement of the time to file a notice of appeal were a "unique circumstance," courts would be able to bypass the Rule 26(b) prohibition against extending appeal deadlines, whether mistakenly or deliberately, and any extension would be immune from review once an appealing party had "relied" upon it.[13]

E. Bowles is not entitled to any further relief from either the appellate or the district court.

In a last-ditch effort to avoid the consequences of his late filing, Bowles argues that the Sixth Circuit, instead of dismissing the appeal, should have vacated the district court's February 10 order and remanded the case with instructions that the district court should issue a new order granting Bowles a fresh 14 days to appeal. Amicus NACDL, in turn, contends in its final effort that this Court should rule that the district court still retains authority to issue another

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[13] NACDL contends that Bowles, as a habeas petitioner, presents an especially compelling case for applying the unique circumstances doctrine. But his plea for more leniency in habeas has it backwards. As explained above, in the habeas context courts have a heightened duty to respect states' interests, including comity and finality. See Part C.2.b.

order reopening the time to appeal, should Bowles so request. Both positions are without merit.

1. The Sixth Circuit was neither empowered nor obliged to remand the case with instructions to the district court to reopen.

Bowles's claim that the Sixth Circuit should have remanded the case for the district court to reopen (again) the time to appeal fails. First, the appellate court did not have jurisdiction over the appeal, so it had no power to order remand. Bowles argues that the appellate court did have jurisdiction, basing his contention upon a single sentence in an April 26, 2004, order of the Sixth Circuit stating that Bowles's appeal was "timely filed as it applied to the February 10, 2004 ruling." JA at 161. But a sentence in an appellate court order cannot confer jurisdiction where none exists. Moreover, the Sixth Circuit explicitly disavowed Bowles's claim that this sentence meant that his appeal was timely filed. The Sixth Circuit explained that the sentence in question in its earlier order was only "surplusage" that "added no meaning to the order." *Bowles v. Russell*, 432 F.3d 668, 677 (6th Cir. 2005).[14] It had no legal effect.

Second, even if the Sixth Circuit had the authority to remand, Bowles offers no reason why it would have been required to do so. At best, his argument is that the Sixth

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[14] As the Sixth Circuit merits panel correctly noted, Bowles had no reason to appeal from the February 10 order granting his motion to reopen because, after all, it was favorable to him. In fact, the earlier Sixth Circuit order may have been referring to Bowles's ability to appeal another portion of the district court's February 10 order that denied Bowles's motion to vacate the court's earlier September 9 order (on grounds that he did not receive notice of that order). But Bowles never prosecuted an appeal regarding the motion to vacate and, even if he had, that action would not have given the appellate court authority over an untimely appeal from the separate district court orders on the merits.

Circuit had the discretion to remand if it considered that remedy appropriate. But, as Bowles concedes, the Sixth Circuit declined to order a remand even after he sought such relief in his petition for rehearing. Bowles offers no reason why the Sixth Circuit should be deemed to have abused its discretion in declining to order a remand. Nor could he. After all, it is certainly within a court's sound discretion to conclude that a litigant should not be excused from failing to comply with the time limit that he himself had requested in a motion to reopen.

Third, Bowles's reliance on *Becker* further undercuts, rather than supports, his remand claim. In *Becker*, the Court ruled that a pro se petitioner's failure to sign his otherwise timely notice of appeal did not require the circuit court to dismiss the appeal. Notably, the *Becker* Court expressly distinguished the Civil Rule 11(a) signature requirements that were at issue here. The Court noted that Rule 11's signature requirements are not jurisdictional, but notice of time limitations are. 532 U.S. at 765-66.

Moreover, even beyond the jurisdictional/ nonjurisdictional distinction, the *Becker* Court based its decision on the fact that Civil Rule 11(a) explicitly provides relief for a party who has not properly acted: The party can subsequently correct the error if it acts promptly after the error is called to the party's attention. See Fed. R. Civ. P. 11(a). *Becker*, therefore, cannot stand as authority for allowing litigants to correct their errors retrospectively when the governing rule in question, such as Fed. R. App. P. 4(a)(6), allows no similar remedy. Indeed, because it relies so heavily on Civil Rule 11(a)'s specific language, *Becker* is better read for the proposition that explicit authority in the rules is required before a court can order such ameliorative action.

2. The district court does not retain authority to reopen the time to appeal.

Amicus NACDL argues as its last resort that the Court should declare that the district court may, under Appellate Rule 4(a)(6), "reopen the appeal period a second time to permit a new and timely appeal." NACDL Br. at 24. However, this issue is not properly before the Court, because Bowles never filed a second request to reopen in the district court. Nevertheless, if the Court does consider NACDL's concededly "novel" suggestion, *id.* at 26, the Court should reject it on its merits.

First, such a construction of Rule 4 leads to nonsensical results. Under this reading, for example, a litigant who fails to file her notice of appeal within the initial 30-day limit would be barred from prosecuting her appeal; nothing could get her back on track. By contrast, a litigant who misses the original 30-day requirement, but is granted leave to reopen under Rule 4(a)(6), can sit back and miss the new deadline and then take yet another bite at the apple. No sound reason supports this distinction.

Second, allowing a second motion to reopen would conflict with the requirement in both Rule 4(a)(6) and 28 U.S.C. § 2107(c)(1)-(2) that a motion to reopen must be filed within 180 days after the entry of judgment or order. Here, for example, if Bowles were to now move the district court to reopen the appeal window, the elapsed time since final judgment would be over three years, or well past the 180-day limit. Recognizing this difficulty, the NACDL argues that no second motion would be needed because the district court could reopen the time to appeal in response to the original motion. NACDL Br. at 25, n.4. But that view is equally untenable, as it means that, once a motion to reopen is properly filed, it remains pending before the district court—even after the district court has ruled on it. The

unreasonableness of this construction should be self-evident; applying this approach to Bowles confirms the point. Under the NACDL's view, Bowles's motion to reopen has been continuously before the district court since it was first filed in December 2003, including during the time when his case was being considered by the court of appeals and by this Court. Not only does this view defy common sense, it also dramatically undercuts the finality and closure purposes underlying Rule 4(a)(6) and § 2107 by allowing a district court to rule on a motion to reopen years after its dispositive order was issued. See *Clark v. Lavallie*, 204 F.3d 1038, 1041 (10th Cir. 2000) (noting that "the essence of Rule 4(a)(6) is finality of judgment").

Third, the NACDL is wrong in relying on cases holding that district courts may recertify an order certifying interlocutory appeals without any additional motion from a party. To begin with, allowing a district court to recertify an interlocutory appeal without a second motion does not indefinitely extend the time that a motion is considered to be pending before the district court. The time for a district court to review a request for an interlocutory appeal ends when the district court reaches a final judgment. Here, by contrast, the NACDL's construction of Rule 4(a)(6) places no end date in sight. Additionally, the finality and closure concerns that support limiting the district court's time to reconsider a motion to reopen do not apply to a district court's decision to reconsider a motion for interlocutory appeal. Interlocutory appeals, after all, are efficiency mechanisms designed to limit the length of judicial proceedings, not to extend them. *Marisol by Forbes v. Giuliani*, 104 F.3d 524, 528 (5th Cir. 1996) (noting § 1292's purpose is to "advance the ultimate termination of the litigation."). The NACDL's view of 4(a)(6), in contrast, only reduces efficiency and delays final judgment.

Finally, the district court cannot reopen Bowles's time to appeal because this case has already proceeded to a final judgment. Bowles's motion to reopen cannot be considered as still pending before the district court, because his case effectively ended when he failed to file a timely notice of appeal.

CONCLUSION

For the above reasons, the Court should affirm the Sixth Circuit's order dismissing Bowles's untimely appeal.

Respectfully submitted,

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